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No. 92-1293

In The

# Supreme Court of the United States

October Term, 1992

NATIONWIDE CORPORATION AND
NATIONWIDE MUTUAL INSURANCE COMPANY,

*Petitioners,*

v.

HOWING COMPANY AND
DOUGLAS McLELLAN,

*Respondents.*

**Petition For Writ of Certiorari**
**To The United States Court of Appeals**
**For the Sixth Circuit**

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the Sixth Circuit correctly held that a private cause of action may be implied for violations of S.E.C. Rule 13e-3 requiring disclosure of items relating to the fairness of "going private" transactions where such rule is promulgated pursuant to Sections 10(b) and 14(a) of the Securities Exchange Act of 1934 (Exchange Act) and pursuant to Section 13(e)(1) of the Exchange Act which in turn was patterned after the preceding sections.

2. Whether the Sixth Circuit correctly reversed the grant of summary judgment for Defendant-Petitioners on the issue of materiality of omitted information in proxy statement soliciting shareholder approval of a "freeze-out" merger (i.e. a merger whereby minority shareholders were forced to accept cash for their shares of stock) where: (a) the proxy statement failed to disclose information required by S.E.C. Rule 13e-3 that the S.E.C. considers to be "particularly important" in these types of transactions; (b) the omitted information related to the fairness of the transaction to minority shareholders; and (c) the omitted information contradicted the issuer's positive representations of fairness of the price which minority shareholders would be forced to accept for their shares of stock.

3. Whether the Sixth Circuit correctly held that sufficient factual issues exist to preclude summary judgment as to the issue of damage causation or other forms of relief where the Plaintiff-Respondents had available to them a state remedy and could have made a different

## QUESTIONS PRESENTED – Continued

decision as to whether or not to pursue this remedy if the defendants had made full disclosure as required by S.E.C. Rule 113e-3.

Plaintiff-Respondents contend that the answer to all of these is yes and that there is no cause for this court to issue a Writ of Certiorari.

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**Petition For Writ of Certiorari**
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**For the Sixth Circuit**

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

Respondents Howing Company and Douglas McLellan respectfully request that the Court deny the issuance of a writ of certiorari to review the judgments and decisions of the United States Court of Appeals for the Sixth Circuit entered on August 17, 1992, March 6, 1991 and August 7, 1987.

## JURISDICTION TO REVIEW IN THIS COURT

Petitioners allege that jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY AND REGULATORY PROVISIONS

1. Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange –
>
> * * *
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

2. Section 13(e)(1) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(e)(1) (1988), provides:

> It shall be unlawful for an issuer which has a class of equity securities registered pursuant to section 12 of this Act, or which is a closed-end investment company registered under the Investment Company Act of 1940, to purchase is in contravention of such rules and regulations as the Commission, in the public interest or for the protection of investors, may adopt

(A) to define acts and practices which are fraudulent, deceptive, manipulative, and

(B) to prescribe means reasonably designed to prevent such acts and practices.

Such rules and regulations may require such issuer to provide holders of equity securities of such class with such information relating to the reasons for such purchase, the source of funds, the number of shares to be purchased, the price to be paid for such securities, the method of purchase, and such additional information, as the Commission deems necessary or appropriate in the public interest or for the protection of investors, or which the Commission deems to be material to a determination whether such security should be sold.

3. Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a) provides:

(a) It shall be unlawful or any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12 of this title.

4. Rule 13e-3(b) under the Securities Exchange Act of 1934, 17 C.F.R. § 240.13e-3 (1990) provides:

(1) It shall be a fraudulent, deceptive or manipulative act or practice, in connection with a Rule 13e-3 transaction, for an issuer which has a class of equity securities registered pursuant to Section 12 of the Act or which is a closed-end investment company registered under the Investment Company Act of 1940, or an affiliate of such issuer, directly or indirectly.

(i) To employ any device, scheme or artifice to defraud any person;

(ii) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(iii) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

(2) As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices in connection with any Rule 13e-3 transaction, it shall be unlawful for an issuer which has a class of equity securities registered pursuant to Section 12 of the Act, or an affiliate of such issuer, to engage, directly or indirectly, in a Rule 13e-3 transaction unless:

(i) Such issuer or affiliate complies with the requirements of paragraphs (d), (e) and (f) of this section; and

(ii) The Rule 13e-3 transaction is not in violation of paragraph (b)(1) of this section.

## DECISIONS OF THE SIXTH CIRCUIT FROM WHICH PETITIONERS APPLY FOR A WRIT OF CERTIORARI

There are three decisions of the United States Court of Appeals for the Sixth Circuit from which Petitioners apply for a writ of certiorari. The first opinion (*Howing I*) was entered on August 7, 1987 and held that an implied right of action exists for violation of Rule 13e-3, promulgated under Sections 10(b), 13(e) and 14(a) of the Exchange Act. This decision also reversed the grant of summary judgment to Petitioners on the issue of whether the Petitioners complied with the disclosure obligations of Rule 13e-3. The Petitioners petitioned for a writ of certiorari to review this decision. This Court denied the petition on August 7, 1987 (487 U.S. 1059 (1988)). The second decision of the Sixth Circuit (*Howing II*) was entered on March 6, 1991. In this decision, the Sixth Circuit held that on the facts presented and in light of the fact that the defendants omitted to disclose information that the S.E.C. deemed particularly important to minority shareholders in a going private transaction, the District Court erred in granting summary judgment to Petitioners on the issue of the materiality of the omitted information. Petitioners again petitioned this Court for a writ of certiorari and on October 7, 1991, this Court issued an order vacating "the judgment"[1] of the Sixth Circuit and

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[1] At page 1 of the petition, Petitioners state that the order or remand vacated "the Sixth Circuit's prior two opinions", thereby suggesting that its Court ordered a reconsideration of issues settled in *Howing I*. However, the order of remand (which Petitioners excluded from their Appendix) does not support this assertion. It says only that "the judgment" is vacated. The order is reprinted in the Appendix hereto.

remanding the case for reconsideration in light of the intervening decision of *Virginia Bankshares, Inc. v. Sandberg*, ___ U.S. ___, 111 S. Ct. 2749, 115 L.Ed.2d 929 (1991) (112 S.Ct. 39 (1991)).

In response to this, and relying on an issue left open in the *Virginia Bankshares* case, on August 17, 1992 the Sixth Circuit issued its third decision (*Howing III*), holding that summary judgment was improper on the issue of damage causation. The *Howing III* Court reasoned that because the required disclosures could have affected the decisions of class members as to whether or not to seek the state law appraisal remedies, there could be damage causation consistent with *Virginia Bankshares*. This opinion remanded the case to the District Court for trial.

## FACTUAL SUMMARY

The *Howing III* opinion adequately states the facts of this case and Plaintiffs offer only a brief summary of the critical facts in this case. A copy of the *Howing III* opinion is included in the appendix to Nationwide's Petition for Certiorari.

This case arises out of a freeze-out merger of Nationwide Corporation, a stock insurance company, into its parent corporation, Nationwide Mutual ("Mutual"). Mutual, which originated the idea of this merger, owned sufficient stock to assure shareholder approval of the transaction. Notwithstanding Mutual's domination of Nationwide, Defendants issued a Proxy Statement to solicit minority shareholder approval of the merger.

Under the terms of the merger, the minority shareholders of Nationwide were forced to accept a cash payment of $42.50 for each share of stock. This price equalled book value. However, First Boston, which Mutual retained to evaluate the fairness of the price, had analyzed comparable transactions and found that such acquisitions ranged from one to four times book value. Thus, Mutual assured itself of shareholder approval of a price at the absolute bottom of the scale of comparable transactions. This, despite the fact that both First Boston and Mutual had concluded that Nationwide was at least an average company (Donald Dep. at 59; Gates Dep. 14-15; R. 95, Ex. F at 9). Plaintiffs presented evidence that only substandard life insurance companies are acquired at one times book value (R. 135, Exhibit K) and that the cash-out price for Nationwide was substantially below the fair value of the Nationwide stock (R. 135 Exhibit B). Andrew Delaney, a widely regarded expert in life insurance valuation, stated that it would be unreasonable to believe that $42.50 represented fair value for Nationwide stock. *Id.*

The Proxy Statement omitted to state that First Boston had found comparable transactions to range from one to four times book value. Moreover, it falsely stated that First Boston and Mutual took liquidation and going concern values into account. In fact the evidence presented to the District Court demonstrated that neither entity attempted to value these items (compare R. 131 Exhibit G (Proxy Statement) at pp. 13-14 with Frenzer Dep. 17; 115-24; 133-34; Donald Dep. at 19; 45; 48; 51; 52; 54; Gates Dep. 48-49).

Plaintiffs, public shareholders of Nationwide, were forced to accept cash for their stock. While it is true that

they testified that they elected not to proceed with this appraisal remedies, they were never asked whether this decision would have been different if the Defendants had made the disclosures required by Rule 13e-3. The reason for this is that the issue of causation was not raised in the summary judgment motion from which Plaintiffs appealed. That motion dealt only with the narrow issue of materiality. The issue of causation was injected in this case only after the decision of *Virginia Bankshares, Inc. v. Sandberg*, ___ U.S. ___, 111 S. Ct. 2749, 117 L.Ed. 2d 208 (1991), which was decided after the opinion by the Court of Appeals in *Howing II*. Thus, the record is still open as to what Plaintiffs would have done if Defendants had complied with Rule 13e-3 and disclosed: (a) that the cash-out price was at the very lowest and of comparable transactions; (b) that Defendants had no reasonable belief that the transaction was fair; or (c) that Defendants actually believed that the price was unfair to the minority shareholders.

## REASONS FOR DENIAL OF THE WRIT

### I. INTRODUCTION

Petitioners have demonstrated none of the reasons articulated in Supreme Court Rule 10.1 for granting a writ. The opinion of the Sixth Circuit is a case of first impression as to the meaning and application of Rule 13e-3. It is not in conflict with any opinion of this Court or of other Circuit Courts of Appeal. Petitioners argue the existence of a conflict among the circuits by using over-generalizations and oversimplifications to distort the holding of the Sixth Circuit. There is no conflict with this

Court's prior holding of *Virginia Bankshares,* because that opinion does not deal with Rule 13e-3 and it left open the question of whether or not loss of a state remedy may be a basis of damage causation.

The essence of this case is the meaning and application of Rule 13e-3. While there may be many potential transactions that could be challenged under this Rule, the fact remains that there are extremely few decided cases dealing directly with Rule 13e-3. This suggests that the Rule may not yet be of enormous practical significance and that this Court should await further judicial developments in the federal court system before delving into the complexities of the Rule.

Petitioners argue that a ruling from this Court is required to alleviate any uncertainty faced by issuers carrying out going private transactions governed by Rule 13e-3. This argument ignores the fact that none of the issues presented for review relate to whether or not there existed a violation of the rule. Rather, all issues relate to the effects of such violation and whether or not an issuer may be held accountable for such violation in a private action. The Rule itself and the lengthy interpretations of it by the S.E.C.[2] provide sufficient guidance to any company that desires to comply with the law. What the Petitioners seek from this court is a guidebook on how to violate the law and escape from the civil consequences of such violation. Surely this Court's time and energy can be devoted to worthier cases.

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[2] SEC Release No. 34-17719 (April 13, 1981), 46 F.R.D. 22571, Fed. Sec. L. Rep. (CCH) ¶23,709; Securities Exchange Act Release No. 16075, 1979 Fed. Sec. L. Rep. (CCH) ¶82,166.

## II. THE SIXTH CIRCUIT'S RULING THAT AN IMPLIED CAUSE OF ACTION EXISTS FOR VIOLATIONS OF S.E.C. RULE 13e-3 WAS CORRECT AND DOES NOT PRESENT AN ISSUE APPROPRIATE FOR SUPREME COURT REVIEW.

Petitioners devote the majority of their Petition to an attempt to persuade this Court to do what it has previously refused to do, i.e. review the ruling on the existence of an implied cause of action for the violation of Rule 13e-3. Their first attempt occurred five years ago and nothing has occurred since then to make their argument any more persuasive.

The intervening decision of *Virginia Bankshares* did not decide the issue of whether a private remedy existed under Section 14(a) (15 U.S.C. § 78n(a)) or Rule 14a-9. It accepted the reality of such implied remedies. 115 L.Ed. 2d 952 n. 11 (Part III of Opinion). As to whether or not a private remedy should be implied under Rule 13e-3, the *Virginia Bankshares* did not change the legal landscape, at least in a manner that benefits the defendants.[3] *Virginia Bankshares* dealt only with the remedial scope of implied remedies. As this Court has recognized, this is distinct from the issue of the existence *vel non* of such remedies:

> " . . . the question of what remedies are available under a statute now provides a private right of

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[3] *Virginia Bankshares* appears to have loosened the criteria for implication of private remedies by stating that courts should also consider policy factors in deciding this issue. *See also Roosevelt v. E.I. DuPont de Nemours & Co.*, 958 F.2d 416 (D.C. Cir. 1992).

> action is 'analytically distinct' from the issue of whether such a right exists in the first place."

*Franklin v. Gwinnet County Public Schools*, ___ U.S. ___, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992). Thus the Sixth Circuit opinion is not contrary to *Virginia Bankshares* or any other Supreme Court authority.

The Sixth Circuit has ruled that a private action may be implied under Section 13(e) of the Exchange Act and the Petitioners' arguments focus narrowly on this section. For the reasons stated persuasively in the *Howing I* decision, the Sixth Circuit correctly held that a remedy should be implied for violations of Section 13(e). However, even if Petitioners' narrow argument regarding Section 13(e) had some force, it would avail the Petitioners nothing. The S.E.C. release adopting Rule 13e-3 makes explicit that it was promulgated pursuant to Sections 10(b) and 14(a) as well as 13(e):

> The Commission hereby adopts Rule 13e-3 and Schedule 13E-3 pursuant to . . . Sections 3(b), 10(b), 13(e), 14(a), 14(c), 14(e) and 23(a) of the Exchange Act.

Securities Exchange Act Release No. 16075, Fed. Sec. L. Reptr. (CCH) ¶82,166 (Aug. 2, 1979) at p. 82,131 (under "Authority"). Both Sections 10(b) and 14(a) prohibit any "deceptive device or contrivance in violation of such rules and regulations" as prescribed by the S.E.C. "for the protection of investors." Rule 13e-3(b)(2) expressly states that its disclosure requirements are "a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices." Thus, a violation of Rule 13e-3 automatically, violates Sections 10(b) and 14(a) of the 1934 Act.

*Virginia Bankshares* confirms the continuing viability of implied remedies under Sections 10(b) and 14(a). Since a violation of Rule 13e-3 also violates these sections,[4] there can be no reasonable doubt as to the existence of a private remedy for violations of the Rule. In addressing only Section 13(e), Petitioners therefore request this Court to squander its time and resources on an issue that is of academic interest in the context of this case and of the going private rules in general.

The Petitioners distort the holding of the Sixth Circuit in a vain attempt to create a conflict between *Howing I* and two other Court of Appeals decisions. Petitioners argue falsely that *Howing I* would "presume an implied damages action for every statute enacted between 1916 and 1975." (Petition at p. i). The *Howing I* opinion nowhere so holds or states. *Howing I* painstakingly analyzed and applied the four factors articulated *Cort v. Ash,* 422 U.S. 66 (1975) and did so in the specific context of Section 13(e) and similar provisions of the Exchange Act. It correctly held that under *Cort v. Ash* and *Cannon v. University of Chicago,* 441 U.S. 677 (1979) the contemporary legal context at the time of the statute may be taken into account to determine whether the *Cort v. Ash* criteria were satisfied.

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[4] Section 10(b) is applicable because plaintiffs were forced sellers of securities. *Marsh v. Amanda Corp.*, 533 F.2d 978, 981-82 (6th Cir. 1976) *cert. denied,* 430 U.S. 954 (1977); *Vine v. Beneficial Finance Co.*, 374 F.2d 627, 632-36 (2d Cir.) *cert. denied,* 389 U.S. 970 (1967); *Dowling v. Narragansett Capital Corp.*, 735 F. Supp. 1105, 1121 (D.R.I. 1990). Section 14(a) is applicable because the material omissions occurred in the context of a proxy statement.

Petitioners do not point to any decision by a Court of Appeals that conflicts with the specific holding of *Howing I* with respect to Section 13(e).[5] Instead they rely on cases involving totally different statutory schemes: *Siebert v. Conservative Party*, 724 F.2d 334 (2d Cir. 1983) *cert. denied* 466 U.S. 980 (1984) (postal regulations restricting non-profit mailing rates for election campaigns) and *American Tel. & Tel. Co. v. M/V Cape Fear*, 967 F.2d 864 (3rd Cir. 1992) (involving a statute protecting underwater cables).[6] Petitioners argue a conflict because they discern a difference in general methodology as to how these courts apply the *Cort v. Ash* factors. In truth, there is not even a clash of method. These cases hold only that post-*Ash* cases interpreting pre-*Ash* statutes must follow the *Cort v. Ash* test in effect at the time of the decision. The Sixth Circuit clearly did this and correctly held that the contemporary judicial interpretation to determine whether or not Congress intended that private remedies exist. However, it did not stop its analysis there. It looked at the specific legislative history of Section 13(e) and the fact that it was patterned after Section 14(a) which does create implied private remedies. It went on to analyze in detail all of the other *Cort v. Ash* factors.

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[5] The *Howing I* holding is consistent with the well-reasoned decision of *Fischer v. Plessy* [1982-83 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶99,246 (S.D.N.Y. 1983) and was recently followed by *Dowling v. Narragansett Capital Corp.*, 735 F. Supp. 1105 (D.R.I. 1990).

[6] The mere fact that these cases involve completely dissimilar statutes indicates the absence of any conflict. The factors of *Cort v. Ash* are general principles and how they apply to particular statutory schemes must be analyzed separately for each such statute.

Petitioners cannot demonstrate a conflict among the courts of appeal. Rather, they simply disagree with the decision of the Sixth Circuit. However, this does not satisfy the criteria for issuance of a discretionary writ of certiorari.

## III. PETITIONERS FAIL TO DEMONSTRATE THAT THE SIXTH CIRCUIT'S DECISION AS TO MATERIALITY IS INCORRECT OR IS IN CONFLICT WITH OTHER DECISIONS OF COURTS OF APPEAL.

In contravention of Rule 13e-3, Petitioners omitted to disclose facts indicating that the cash-out price offered to minority shareholders was unfair in relation to indicia of value such as net asset value[7]. The omitted facts also contradicted Petitioners assertions that the cash-out price was fair in general and relative to book value. The S.E.C. has stated that disclosure of items involving indicia of fairness such as the above are particularly important and must be disclosed in detail in the forepart of the disclosure document (in this case a Proxy Statement) related to the going private transactions. The Sixth Circuit held that based on this record, the District Court erred in granting summary judgment to Petitioners on the issue of materiality.

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[7] Specifically, they failed to disclose the finding of their own valuation expert that comparable life insurance companies are normally valued at one to four times book value. In this case, Petitioners proposed to acquire Nationwide, an average life insurance company at only one times the book value, the lowest end of the range of comparable transactions.

As stated by the *Howing III* court, *Virginia Bankshares* "in no way undermines" the analysis of the previous opinion as to materiality. If anything, *Virginia Bankshares* gives a more expansive reading to the concept of materiality. It holds that statements of opinion as to the fairness of a freeze-out price as well as the underlying reasons or factors of valuation for such opinion may be material under the general anti-fraud rules of the securities laws.[8] Even without the benefit of the rebuttable presumption discussed below, such information would be clearly material under *Virginia Bankshares.*

In addressing materiality, the *Howing II* court correctly analyzed specific items of information which the S.E.C. has characterized as "particularly important" to minority shareholders, and held such information to be presumptively material of purposes of defeating a motion for summary judgment. This follows the holdings of *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976), and

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[8] "We think there is no room to deny that a statement of belief by corporate directors about a recommended course of action, or an explanation of their reasons for recommending it, can take on just that importance. Shareholders know that directors usually have knowledge and expertise far exceeding the normal investor's resources, and the directors' perceived superiority is magnified even further by the common knowledge that state law customarily obliges them to exercise their judgment in the shareholders' interest. *Cf. Day v. Avery*, 179 U.S. App.D.C. 63, 71, 548 F.2d 1018, 1026 (1976) (action for misrepresentation). Naturally, then, the share owner faced with a proxy request will think it important to know the directors' beliefs about the course they recommend, and their specific reasons for urging the stockholders to embrace it."

115 L.Ed.2d at 944 (Part II-A of Opinion).

*James v. Gerber Products Co.*, 587 F.2d 324, 327 (6th Cir. 1978), which caution that materiality is an issue of mixed law and fact that will rarely be determined by summary judgment motion. *Id.* at 450. This ruling was also in complete harmony with the *TSC Industries* opinion with regard to the importance of S.E.C. disclosure regulations in determining materiality:

> The S.E.C.'s view of the proper balance between the need to assure adequate disclosure and the need to avoid the adverse consequences of setting too low a threshold for civil liability is entitled to consideration.

*Id.* at 438. The *Howing III* court expressly held that the presumption was subject to rebuttal "in the normal way under Rule 301 of the Federal Rules of Evidence" (Appendix to Petition at 32a). In the specific context of this case, the court held that Petitioners "have not rebutted this presumption so as to avoid trial because they have not established the lack of significance of the information with sufficient clarity." (Appendix to Petition at 34a). This is a sound decision and should stand.

Once again, Petitioners create a fiction in order to find a conflict between *Howing II* and other courts of appeal. This time they claim that *Howing II* held the TSC standard to be inapplicable to a 13e-3 transaction. *Howing II* did no such thing. It clearly held the TSC standard to apply: ". . . we agree with the District Court that the general TSC standard is applicable to transactions governed by Rule 13e-3 . . . " (Appendix to Petition at p. 3(a)). In relying on the specific provisions of Rule 13e-3 to find a rebuttable presumption of materiality, *Howing II* cannot have acted in conflict with any other federal

appellate court decision because Petitioners have not cited and Respondents are unaware of any court of appeals holdings as to the meaning or operation of Rule 13e-3 let alone the concept of materiality for purposes of the Rule.[9]

Once again the Petitioners are reduced to mere disagreement with the results below. They have not made their case for discretionary review by this court.

## IV. BECAUSE THE SIXTH CIRCUIT RESTED ITS DECISION ON AN ISSUE LEFT OPEN IN *VIRGINIA BANKSHARES* AND BECAUSE IT DOES NOT CONFLICT WITH DECISIONS OF ANY OTHER CIRCUIT COURT OF APPEALS, THERE IS NO CAUSE FOR THIS COURT TO ISSUE A WRIT OF CERTIORARI.

In their final argument for a Petition, Petitioners seek review of the holding of *Howing III* that the Plaintiffs may pursue a remedy under the federal securities laws because the non-disclosure could have affected their decision of whether or not to pursue their state law appraisal

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[9] The Sixth Circuit decision does not conflict with any of the decisions cited by Petitioners. *Berg v. First American Bankshares, Inc.*, 796 F.2d 489 (D.C., Cir. 1986), is the only appellate decisions cited by Petitioners as dealing with Rule 13e-3. In fact, the *Berg* Court did not address a violation of Section 13(e) or Rule 13e-3. The court made a reference to whether an alleged violation of Section 13(e) can serve as a predicate act of racketeering activity under the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §§ 1976-1968 (RICO). The court merely restated the holding of the Sixth Circuit, that liability under Section 13(e) requires a finding of materiality. *Berg*, F.2d at 502.

remedies. In holding that Plaintiffs have a claim for relief, the previous panel carefully limited its reasoning to an issue left open in the *Virginia Bankshares* case, the loss of a state remedy for appraisal of the value of stock.[10] The panel in *Howing III* correctly noted that the *Virginia Bankshares* majority did not decide whether or not a Proxy Statement may be actionable where it causes a minority shareholder to forgo a state remedy. (Op. at 10). Thus, by resting its holding on the basis that the *Howing* plaintiffs and the class they represent could have a claim for loss of state remedy, the *Howing III* decision did not conflict with the *Virginia Bankshares* case.[11]

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[10] Respondents also argued below that because of the unique disclosure requirements of Rule 13e-3 (which, unlike Rule 14a-9, requires an express and reasonable statement that the transaction is either fair or unfair), the *Virginia Bankshares* holding as to causation should not apply to a case such as the present where, in order to comply with Rule 13e-3, the Defendants would have had to state publicly and expressly that the transaction was unfair (or change the terms of the transaction to make it fair). The *Virginia Bankshares* Court did not address any aspect of Rule 13e-3 (because it apparently was not argued) and expressly noted that it did not have occasion to decide whether or not the directors were obligated to state reasons for their support for the merger. 115 L.Ed. 2d at 949 n. 7 (Part II-C of Opinion). The *Howing III* panel did not accept this argument. If this Court should grant the Writ of Certiorari, Petitioners intend to present this argument.

[11] Petitioners read into the hallmark cases of *J.I. Case v. Borak*, 377 U.S. 426, 431 (1964) and *Mills v. Electric Auto-Life Co.*, 396 U.S. 375 (1970) the absurd proposition that federal law is concerned with the voting process only where votes are needed to authorize corporate action. Neither of these cases so hold or even intimate such a conclusion. In making this argument, Petitioners point out language which emphasizes the importance of

Petitioners fare no better in their argument that *Howing III* conflicts with other decisions of courts of appeal. They rely on two cases. In *Scattergood v. Perelman*, 945 F.2d 618 (3rd Cir. 1991), there is no indication that the plaintiffs even argued a loss of state remedy theory of causation. Seemingly *sua sponte*, the court offered the footnote observation that "one possible exception" to the *Virginia Bankshares* rule was where the misrepresentation caused a shareholder to forgo a state law right to enjoin a merger. The court then noted that the plaintiffs did attempt to enjoin the merger. Thus, *Scattergood* accepts (or at least does not reject) the major premise of *Howing III* that loss of a state law remedy may constitute damage causation. Likewise, the case of *Boone v. Carlsbad Bancorporation, Inc.*, 972 F.2d 1545 (10th Cir. 1992) accepts this major premise but held on the particular factual record before it that the plaintiffs had not produced sufficient evidence to demonstrate causation on this issue.[12]

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these voting rights and then leap to the non-sequitur that federal securities law is concerned only with these situations. They ignore the obvious truism that Rule 13e-3 was adopted to protect shareholders in exactly the situation where they lack sufficient votes to protect themselves. They also ignore the plain language of Section 14(a) of the Exchange Act that prohibits the solicitation of "any proxy" if done in violation of the rules adopted by the S.E.C. Given the above, it is little wonder that the second circuit has recently repudiated this very argument. *Wilson v. Great American Indus., Inc.*, 979 F.2d 924, 931-32 (2d Cir. 1992).

[12] Although these cases are fully consistent with *Howing III*, it should be noted that neither involve the unique disclosures mandated by Rule 13e-3 and neither involve the lost appraisal rights.

The one case that is most closely related to *Howing III* is *Wilson v. Great American Indus., Inc.*, 979 F.2d 924 (2d Cir. 1992) which Petitioners relegate to a footnote. This case is fully consistent with *Howing III* and holds that minority shareholders may prove damage causation by proving that they were induced not to seek appraisal remedies under state law.

Having failed to establish that *Howing III* conflicts with other decisions by federal courts of appeal, Petitioners are reduced to the narrow, case-specific argument that Plaintiffs did not offer adequate proof of this factual theory. In making this argument of desperation, Petitioners ignore that the defense of non-causation was not raised before the District Court in the motion for summary judgment. Rather, it was raised for the first time after *Howing III* and was considered by the Sixth Circuit only upon remand from the Supreme Court. Thus, the Plaintiffs never had the opportunity to submit affidavits addressed to what they would have done had Petitioners made the full disclosures required by Rule 13e-3.

The *Howing III* court thoroughly considered the Defendants' fact-based argument. It held that had full disclosure been made, the Plaintiffs may well have chosen to pursue an appraisal proceeding. This makes perfect sense. In making a decision whether or not to seek an appraisal remedy, the shareholder must weigh the risk,[13] cost, and benefit of an appraisal proceeding. The degree

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[13] The appraisal statute as it then existed provided only that the dissenting shareholder receive the actual fair cash value. In theory, this amount could be less than the merger price. R.C. §1701.85 (Page's 1985).

and type of disclosure will have an obvious effect on this decision making process. Clearly, if Mutual had informed the Plaintiffs that the cash-out price was at the lowest extreme of comparable transactions, such a revelation could have had a dramatic impact on the assessment of cost and benefit. *Virginia Bankshares* held that a false statement of fairness can violate the general Securities anti-fraud rules. 115 L.Ed. 2d at 946 (Part II-B-1). If the Defendants had complied with Rule 13e-3 and affirmatively stated their conclusion that the price was unfairly low, the impact would have been even greater. Assuming that the transaction would have gone forward at all with such a disclosure, it would be irrational for a shareholder not to assert an appraisal remedy, for such a disclosure would virtually guarantee a successful outcome and additional revenue to the shareholder.

In the alternative, Plaintiffs should have the right to pursue equitable remedies. Since the Proxy Statement violated Rule 13e-3, the resulting merger transaction should be void under Section 29(a) of the Securities Exchange Act. 15 U.S.C. § 78dd(a). Thus, after a full trial, the District Court could rescind the merger and all prior proxies and require a resolicitation of proxies with corrective disclosure as required by Rule 13e-3. At that point, all minority shareholders, including Plaintiffs, could elect whether or not to ratify the merger or seek an appraisal remedy. Such an equitable remedy would fully vindicate the policies underlying the Exchange Act and fully protect the legitimate interests of minority shareholders who were induced to acquiesce in a cash-out price that their directors falsely represented to be fair. Established case

law recognizes the power of the court to order corrective disclosure and equitable relief.[14]

The critical question should not be whether Plaintiff's claim deserves to go forward. It does. Rather, it is a question of fashioning an appropriate remedy for the statutory violation. There are many possible remedies consistent with *Virginia Bankshares*. Plaintiffs submit that it is premature at this pretrial stage to limit possible remedies for the Petitioners' violation of the Exchange Act, and that they are entitled to a full trial on the merits to determine both the violation and the most effective remedy.

Even if Petitioners' fact based argument had any merit, it would not rise to the level of importance of issues worthy of the time and attention of this Court. It would be a colossal waste of the precious resources of this Court to review deposition testimony to determine whether or not individual class representatives would have chosen to assert their state law appraisal remedies if Petitioners had made the full disclosure required by Rule

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[14] *Pacific Realty Trust v. APC Investments, Inc.*, 685 F.2d 1083, 1986 (9th Cir. 1982); *Koppers Co., Inc. v. American Exp. Co.*, 689 F.Supp. 1371 (W.D. Pa. 1988); *Newell Co. v. Vermont American Corp.*, 725 F.Supp. 351 (N.D.Ill. 1989); *Huddleston v. Herman & McLean*, 640 F.2d 534, 554 (5th Cir. 1981); *Garnatz v. Stifel, Nicolaus & Co.*, 559 F.2d 1357, 1360 (8th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978); *United Canso Oil & Gas Ltd. v. Clark*, 497 F.Supp. 110 (S.D.N.Y. 1980); 3C *Bloomenthal, Securities and Federal Corporate Law*, (Clark Boardman 1991 Revision), §13.17[2][b] at 13-102 (courts "can disregard niceties . . . and apply whatever remedies are necessary to effectuate the broad remedial purpose" of the proxy rules).

13e-3. This is especially so where this matter has never been presented to or determined by the District Court in the first instance.

## CONCLUSION

It is respectfully submitted that Petitioners have failed to sustain their burden of establishing that there are special and important reasons why a writ of certiorari should be granted. The decisions below do not conflict with any decision of another circuit court, or of this Court. Since the decisions correctly apply principles previously articulated by this Court, they do not involve any important question of federal law which has not been, but should be settled by this Court. In addition, this case is not ripe for consideration because there has been no trial and, thus, no final decision on the merits.

Petitioners have shown no reason why this Court should exercise its sound judicial discretion to entertain this case.

Respectfully submitted,

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Date: March 4, 1993

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 7, 1991

Mr. Jeffrey S. Davidson
Kirkland & Ellis
300 S. Grand Avenue, Ste. 3000
Los Angeles, CA 90071

Re: Nationwide Corporation, et al.
v. Howing Company and Douglas McLellan
No. 90-1853

Dear Mr. Davidson:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of Virginia Bankshares, Inc. v. Sandberg, 501 U.S. ___ (1991).

Very truly yours,

William K. Suter, Clerk